

Are SARCs and Advocates advising victims that they are unable to consent to sex if they had been drinking prior to the sexual act under the guise that they are "incapacitated?"

Please ensure that SARCs and Advocates are not advising victims that if they were drinking prior to a sexual assault they were unable to consent due to "incapacitation". Also ensure that this guidance is not being briefed at awareness trainings. Be mindful that a victim's ability to consent is based on a number of issues, i.e. medical and legal findings etc. SARC's and Advocates should encourage victims who elect UNRESTRICTED reporting to disclose the details of the incident to law enforcement and the SAC. Those who elect RESTRICTED reporting should relay this information to the SAC so that it can be captured during the forensic examination. If the case goes to trial, this information will probably be addressed at that time and decisions made regarding the victims abilities to consent or not.

OTJAG, Criminal Law Division brought to my attention that there is much confusion among SARCs and Victim Advocates about what constitutes "incapacitation" of a victim's ability to consent to sexual acts if he/she has been drinking. Some Vas or SARCs are defining a victim as "incapacitated" if she or he had been drinking immediately prior to the act, therefore unable to consent. There is concern that this incorrect and perhaps broad assumption places alleged perpetrators at a major disadvantage if a case goes to trial. It has the potential for causing serious disruption of the military justice system.

OTJAG, Criminal Law Division advises that consuming alcohol to the extent that inhibitions are diminished and where someone consents to an act that is not well reasoned or is an act that the person would not ordinarily consent to if totally sober is different from being incapacitated. Stated another way, an intoxicated woman can engage in consensual sex. **Lack of inhibition or judgment due to alcohol consumption does NOT equate to lack of ability to consent.** These cases depend upon the facts of each case, and will require medical/legal expert advice. The Army has a set of instructions for court-members (jury) that provides guidance in making such determinations. They are in DA Pamphlet 27-9 at pp. 438-440.

These concerns do not apply to unconscious victims. Soldiers who are unconscious cannot consent to sex acts.